SUPREME COURT, U. S.
No. 73-224
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT M. ROSE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner brought this suit in the United States District Court for the Eastern District of Louisiana seeking review and vacation of a Tax Court decision regarding his tax liability for 1964,[1] a refund of the taxes paid pursuant to that decision, and a permanent injunction prohibiting all future proceedings, assessments, and levies by the Commissioner based on that decision. The district court dismissed the case for failure to state a claim upon which relief could be granted (Pet. A1-A2). The court of appeals affirmed *per curiam* and denied petitioner's petitions for rehearing and rehearing *en banc* (Pet. A4).

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[1] *Rose* v. *Commissioner*, 52 T.C. 521, affirmed *per curiam*, 435 F. 2d 149 (C.A. 5), certiorari denied, 402 U.S. 907. Petitioner has also litigated the same issue on similar facts for the years 1966 and 1967. *Rose* v. *Commissioner*, 32 T.C.M. 1, on appeal, C.A. 5, No. 73-2023.

Petitioner having chosen to litigate his tax liability for the year 1964 in a deficiency proceeding in the Tax Court, both courts below correctly held that Section 6512(a) of the Internal Revenue Code of 1954 bars him from litigating the same issue by bringing a refund suit for that year in any other court.[2] Apart from this statutory ground, the Tax Court decision is a bar to petitioner's claim under the doctrine of *res judicata,* which this Court has held to apply to federal tax proceedings involving the same claim and the same year. *Commissioner* v. *Sunnen,* 333 U.S. 591.

Petitioner seeks to avoid the prohibitions against this suit by characterizing the Tax Court's findings as fraudulent (Pet. 13, 17, 21). Such a collateral attack may be maintained only where extrinsic fraud is shown, *i.e.,* where an unsuccessful litigant has been prevented by fraud or deception from fully presenting his case. *United States* v. *Throckmorton,* 98 U.S. 61; *Kenner* v. *Commissioner,* 387 F. 2d 689 (C.A. 7). However, petitioner makes no specific allegations of fraud. His sole complaint appears to be that the Tax Court's decision was adverse.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[2] Petitioner's suit to enjoin collection of the tax at issue is barred by Section 7421(a) of the Internal Revenue Code.

[3] The substance of petitioner's claim is that certain expenses for food, lodging and other personal needs for his daughter were deductible as medical expenses (Section 213 of the Internal Revenue Code) since they were incurred in her seeking a change to a more healthful climate. This Court has held that such expenses are not deductible as medical care. *Commissioner* v. *Bilder,* 369 U.S. 499.